No. 13443

In The

United States Court of Appeals

For the Ninth Circuit

SOUTHERN PACIFIC COMPANY, *Appellant*,

vs.

ALMA RAISH, *Appellee*.

Appeal from the United States District Court
for the District of Oregon

HONORABLE GUS J. SOLOMON, Judge

APPELLANT'S REPLY BRIEF

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REPLY TO APPELLEE'S SUMMARY OF FACTS AND CONTENTIONS

Appellee has adopted the statement of facts contained in the opening brief but raises one point calling for the necessity of reply, which is that Exhibit 4, being photograph of the railroad overpass, "shows considerable wear and tear *presumably* from the passage of traffic and vehicles which came in contact with this bulkhead." We repeat what was stated in Appellant's

opening brief—there is no evidence in the record to show that the railroad had any actual or constructive notice that the conditions existing at the overpass were dangerous.

It is highly improper to speculate as to the cause or origin of the marks or the type of marks on the overpass bulkhead. Had any prior accidents occurred at this overpass, surely Appellee would have introduced evidence thereof.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. I

This Court is directed to the strong dissenting opinion in the case of *Pellett v. Sonotone Corp. et al*, 26 Cal. (2d) 705, 160 P. (2d) 783, 160 A.L.R. 863, cited by Appellee as authority for the proposition that the covenant not to execute should not be construed as having the same legal effect as a release. Unlike the covenant not to execute in the instant case (Exhibit 38) the covenant in the *Pellett* case contained an express recital that the covenant would in no wise prevent recovery from the other joint tort feasor.

The attempted distinction between a release and the subject covenant is entirely artificial. The injured party's right to recover money was as completely abandoned and relinquished when she signed this covenant

as though she had executed a document labelled a "release." Injured parties are interested in money compensation or as termed by some an adequate award, and when the *right to receive money* is bargained away we should be realistic and look at the real purpose of the transaction.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. II

A

As to Appellant's requested instruction No. VI, which defines the grade of evidence sufficient to justify a verdict, even in *Willoughby v. Driscoll*, et al, 168 Ore. 187, 120 P. (2d) 768, 121 P. (2d) 917, the Oregon Supreme Court in discussing this instruction stated:

> "We agree that this requested instruction should have been given."

We have no quarrel with Appellee's statement or with the citations of authority to the effect that when the instructions given contain the law requested by the party it is not error to refuse to give the requested instructions verbatim. But this proposition is inapplicable here as the instructions quoted by Appellee at pages 5 and 6 of the Answer deal with the preponderance of the evidence but do not define the *quality* of the evi-

dence. In the *Willoughby* case, cited by Appellee, the error charged was that the trial court gave the usual instructions concerning burden of proof and advised the jury that negligence had to be established by the preponderance of the evidence, but the Court there failed to define the quality of evidence necessary to support the verdict. As noted above the Oregon Supreme Court stated that the requested instruction should have been given. Oregon does not recognize the scintilla rule of evidence as shown by Section 2-111 O.C.L.A.

B

Appellee makes no contention that this overpass was not constructed and maintained so as to afford sufficient clearance for *ordinary use of the highway*. The testimony of Appellee's civil engineer shows that the Los Angeles-Seattle Motor Express truck could have been off the paved portion of the highway to some extent and still not come into contact with the metal knee brace at the top corner of the overpass.

Appellee in presenting definitions of the "street" and "highway" has quoted from the Uniform Motor Vehicles Safety Responsibility Act (Sections 115-401 to 115-437, O.C.L.A.) dealing with the necessity for carrying liability insurance and also from the Uniform Operators and Chauffeurs License Act (Sections 115-201 to 115-234,

O.C.L.A.). The Uniform Traffic Act (Sections 115-301 to 115-3,100, O.C.L.A.) regulates traffic on Oregon highways and is the Act with which we are concerned.

In Section 115-301, O.C.L.A., we find the following definition:

> "The following words and phrases when used in this Act shall, for the purpose of this Act, have the meanings respectively ascribed to them in this section, except in those instances where the context clearly indicates a different meaning.
>
> * * *
>
> (r) 'Roadway.' That portion of a street or highway improved, designed or ordinarily used for vehicular travel."

The record conclusively shows there was sufficient clearance under this overpass for persons making ordinary use of the public way and that this charge of negligence should have been withdrawn from the jury's consideration.

C

We adopt Appellee's argument that this accident would not have happened had the Los Angeles-Seattle Motor Express truck remained upon the paved lane of the highway as it existed under this overpass. The truck driver testified that he was forced off the highway

because of another red truck approaching from the opposite direction, stating:

> "I noticed he was quite a ways over in my lane * * * so I swerved to my right to avoid a collision * * *." (Tr. p. 73)

Admittedly, either the driver of the red truck or the driver of the Los Angeles-Seattle Motor Express truck, or both drivers, were driving in a careless and negligent manner which caused the Los Angeles-Seattle Motor Express truck to come into contact with the overpass. Appellee admittedly makes no contention to the contrary. (See p. 19 of answering brief.) The negligent operation of these trucks, the red truck being over the center line and the other truck being off on the gravelled shoulder under the known overpass, cannot be considered an ordinary use of the highway.

Since by the law of the case the Appellant had a right to assume that persons would not drive in a careless and negligent manner (Tr. pp. 126,127), and further since Appellee now states that the Los Angeles-Seattle Motor Express truck, being 8 feet wide, would not have touched the overpass had it remained on the paved lane of the highway, being 8′8″ wide, we submit there is no evidence of insufficient width and such a requested instruction should have been given.

D

With reference to the requested statutory instruction on stopping distances dealing with the efficiency of the truck's brakes, Appellant reiterates its contention that the jury should have been given a standard by which to measure the adequacy of the brakes on this combination of vehicles.

In *Smith v. Pacific Northwest Public Service Co., et al.*, 146 Ore. 422, 430, 29 P. (2d) 819, cited by Appellee, where a similar instruction was requested, the Court held that

> "it was not proper for the court to instruct upon a question which was not an issue both by the pleadings and the evidence."

In the instant case the adequacy of the trucking equipment brakes was made an issue by both the pretrial order and the evidence.

By the requested instruction Appellant did not claim that the Los Angeles-Seattle Motor Express truck driver was negligent if he could not bring his equipment to a stop within the distance specified by statute. The Oregon Supreme Court has referred to this same statute (Section 115-376, O.C.L.A.) as a guide in determining whether brakes on a motor vehicle were adequate when the

undisputed evidence showed that the pavement was wet. See *Hamilton v. Finch*, 166 Ore. 156, 163-165, 109 P. (2d) 852, 111 P. (2d) 81.

Appellant in its request listed the conditions under which the stopping distances were applicable by statute such as a dry and hard surface. We recognize that at the time of this accident the pavement was wet. The request was made only so the jury would have some guide to assist them in determining whether the brakes on this trucking equipment were reasonably efficient, because the undisputed evidence shows that this combination of vehicles was not brought to a stop within a distance of 215 feet, although the equipment was initially travelling at a speed of thirty miles per hour.

The jury should have been given the statutory guide requested by the instruction.

E

As Appellee states, the trial court ruled as a matter of law that the covenant not to execute was to be considered as in the nature of a covenant not to sue. Yet after the Court had so ruled, Appellee was permitted to testify as to her intent in signing the document. If, as Appellee now contends this was a matter solely for the Court's determination, as agreed by the pretrial

order, then Appellee should not have insisted upon making this a question of fact for the jury by eliciting testimony on the subject.

Since the question of intent was the subject of oral testimony by Appellee herself on direct examination and therefore became a question of fact for the jury, the Appellant was entitled to an instruction on its theory of the case. Apparently it is not denied that had there been no reservaion to proceed against third parties, the instrument would have released the Appellant.

The very fact in issue was not properly submitted to the jury.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. II

Significantly, "roadway" as defined by Section 115-301, O.C.L.A., does not include the shoulders of the highway, although the trial court was apparently under the belief that it did when it instructed the jury:

> "Vehicular traffic is entitled to use the entire roadway, including the shoulders * * * ." (Tr. p. 126)

Even the case of *Oja v. LeBlanc*, 185 Ore. 333, 203 P. (2d) 267, cited by Appellee in support of the alleged erroneous instruction given, indicates that where a driver of a motor vehicle drives off the pavement and on

the shoulder at the time of an accident, that fact is evidence from which the jury can find negligence on the part of that driver. In the *Oja* case the judgment, based on the jury finding that the defendant was on the shoulder at the time of the accident, was affirmed on appeal.

The Oregon law on the question whether a driver has the right to drive upon the shoulder of the highway was discussed at length in *Prauss, Admx. v. Adamski*, 54 Ore Adv. Sh. 803, 244 P. (2d) 598. Appellee in answering Appellant's contention as to the import of this recent case, when compared with the subject instruction, states only that the *Prauss* case was decided 12 days after judgment was entered in the instant case. A comparison of the language contained in the subject instruction and that part of the *Prauss* opinion quoted in Appellant's opening brief leads the reader to diametrically opposite conclusions. The Federal trial court for the District of Oregon instructed the jury that motor vehicles are entitled to use the entire roadway and the entire width of the shoulders, while the Oregon Supreme Court held in the *Prauss* case that the mere fact that a driver leaves the paved portion of the highway raises an inference of negligence on the part of the driver.

In *Krause v. Southern Pacific Company et al.*, 135 Ore. 310, 295 Pac. 966, relied upon by Appellee, the jury

found an obstruction was mantained *over the paved* portion of the highway when the truck was admittedly making an ordinary use of the highway.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. IV

There was direct testimony from the driver of the Los Angeles-Seattle Motor Express truck that the steering mechanism of the truck was impaired (Tr. p. 83). Contradictory testimony by the same witness only served to raise a question of fact which should have been decided by the jury.

REPLY TO ANSWER TO SPECIFICATION OF ERROR NO. V

We disagree with Appellee's statement that it is not evidence of lack of negligence for Appellant to show that other similar accidents had not occurred at this same overpass on previous occasions. In this connection see *Robertson v. Coca Cola Bottling Co.*, 54 Ore. Adv. Sh. 1421, 1433, 247 P. (2d) 217, where the Oregon Supreme Court quotes approvingly as follows:

> "'* * * Evidence of the absence of prior accidents resulting from the same physical defect or inanimate cause, under substantially similar circumstances, is admissible to prove that such defect or cause was not dangerous or likely to cause such accidents, and further to prove that the person responsible for the defective condition was not reasonably chargeable with knowledge of its dangerous character. * * *' "

CONCLUSION

Appellant respectfully urges this court to correct the errors of the trial court and reverse the judgment with instructions to grant the motion for judgment notwithstanding verdict, or in the alternative to remand the case for a new trial.

Respectfully submitted,

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